

Federal Communications Commission

DA 00-1208

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 97-116
Table of Allotments,)	RM-9050
FM Broadcast Stations.)	RM-9123
(Everglades City, LaBelle, Estero)	
and Key West, Florida) ¹)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 24, 2000

Released: June 2, 2000

By the Chief, Allocations Branch:

1. In response to a Petition for Rule Making filed by Keith L. Reising ("Reising"), the Commission has before it for consideration the Notice of Proposed Rule Making, 12 FCC Rcd 22900 (1997), requesting the allotment of Channel 224A at Everglades City, Florida, as that community's first local service. Reising filed comments in which he reaffirmed his interest in Channel 224A at Everglades City. InterMart Broadcasting West Coast, Inc. ("InterMart") filed a counterproposal.² Reising, InterMart, Spectrum Radio, Inc. ("Spectrum") and Community Resource Foundation, Inc. ("CRF") filed reply comments.

2. InterMart counterproposed the deletion of Channel 223C3 at LaBelle, Florida, reallocation of the channel to Estero, Florida, and modification of its construction permit for Station WWWD³, LaBelle, to specify operation at Estero in accordance with Section 1.420(i) of the Commission's Rules.⁴ To accommodate Channel 223C3 at LaBelle, InterMart requests the substitution of Channel 223C1 for Channel 224C1 at Key West, Florida, and modification of the license for Station WEOW,

¹ The communities of LaBelle, Estero and Key West, Florida have been added to the caption.

² Public notice of the counterproposal was given on July 10, 1997, Report No. 2211 (RM-9123).

³ The call sign has been changed from WKZY to WWWD.

⁴ On August 29, 1996, InterMart filed an application for a minor change to modify its license for Station WKZY to operate as a Class C3 station in lieu of a Class A station. That application was granted on December 4, 1996, and rescinded shortly thereafter. The Commission discovered on January 3, 1997, that an application filed by Community Resource Foundation, Inc. for a non-commercial station at Bayshore, Florida, filed three days prior to InterMart's, was mutually exclusive with InterMart's application for Channel 223C3 at LaBelle. InterMart has sought reconsideration of the Commission's action. Station WKZY is licensed as a Class A facility with a one-step application on file to upgrade to C3 at LaBelle. We will modify the license for Station WKZY to specify operation as a class C3 facility in this proceeding if the change of community from LaBelle to Estero is granted.

Key West, to specify operation on Channel 224C1. In support of the counterproposal, InterMart states that the reallocation will not deprive LaBelle of its only local transmission service as Toccoa Falls College has filed an application for a construction permit for a new noncommercial educational FM station at LaBelle. InterMart states that Estero is a community for allotment purposes as it is a Census Designated Place with a 1990 population of 3,177 people and has its own U.S. Post Office and zip code (33928). Further, Estero has many retail businesses, a fire station and rescue squad. InterMart continues that Estero has two United Methodist Churches, a Baptist Church and Church of God of Estero, as well as two country clubs, an auto dealership and several real estate companies. InterMart points out that Estero is not located within an urbanized area and its proposed city grade contour for Channel 223C3 would cover approximately 46% of the Naples, Florida, Urbanized Area and about 5% of the Fort Myers-Cape Coral Urbanized Area. InterMart states that it intends to relocate its transmitter site for Station WWWD which currently covers 1,279.2 square kilometers with a population of 20,540 as a Class A facility. Station WKZY, operating at Estero as a Class C3 Station would cover 3,266.6 square kilometers with 133,207 people. According to InterMart the area gained by the reallocation proposal will be 3,096.4 square kilometers and 126,267 people with a loss area of 1,110.9 square kilometers containing 17,759 people for an increase of 155% in area and 551% in population. InterMart further states that although there is a loss area, that area receives service from at least five full-time reception services which the Commission considers to be well served. InterMart also points out that grant of its counterproposal would also permit the assignment of a new noncommercial FM station at Bayshore, Florida (File No. BPED-960826MK).⁵

3. Reply comments were filed by Reising, InterMart, Spectrum and CRF. Reising continues to support the allotment at Everglades City, opposing the reallocation of Station WWWD from LaBelle to Estero. Reising believes that InterMart's proposal will deny the small communities of LaBelle and Everglades City from having their own local radio stations and that the application of Toccoa Falls College for a non-commercial station on Channel 202 at LaBelle is an inferior service when compared to the existing service provided to LaBelle from Station WWWD. InterMart argues that Reising's petition for rule making was not verified as required by Section 1.52 of the Commission's Rules and should be dismissed. InterMart states that should the Commission ignore its rules and consider Reising's proposal, InterMart's proposal to reallocate Channel 223C3 from LaBelle to Estero should be preferred over an allotment at Everglades City as Everglades City should be deemed a "quiet village" and no channel should be allotted to it. According to InterMart, Everglades City is served by 13 AM stations and 4 FM stations and is considered to be well served by Commission standards. InterMart argues that Reising is incorrect when he argues that the Toccoa Falls College station would be an inferior service when compared to the existing service of Station WWWD.⁶

⁵ Reallocation of Channel 223C3 from LaBelle to Estero, Florida, will remove the conflict between the one-step application for Channel 223C3 at LaBelle and the application for Bayshore, Florida. Currently, neither application can be granted until the issues of mutual exclusivity are resolved. Thus, the reallocation of Channel 223C3 to Estero could result in a first local service to Bayshore.

⁶ In late-filed supplemental comments, InterMart points out that on May 20, 1999, the Commission issued a license to Toccoa Falls College for Station WBIY, LaBelle, Florida (BLED-990426KE).

InterMart points out that there is significant local public support for the reallocation of Channel 223C3 at Estero providing declarations from persons representing local businesses and civic organizations. InterMart concludes that first local service to Estero should be preferred over a first local service at Everglades City because of Estero's greater population and the resolution of the potential mutual exclusivity with the application for Channel 220A (BPED-960826MK) at Bayshore, Florida, which would permit a first local service in that community. CRF, an applicant for a noncommercial FM station in Bayshore, Florida, submitted reply comments supporting InterMart's counterproposal. CRF states that InterMart's proposal allows for grant of CRF's application at Bayshore and improvement of InterMart's facilities for Station WWWD. CRF believes that the public interest will be served by allowing a first local service at two communities, Bayshore and Estero, rather than to just one community as originally proposed in the Notice. Spectrum, licensee of Station WEOU, Key West, Florida, states that it does not desire to change the operating frequency of Station WEOU from Channel 223C1 to Channel 224C1 and opposes the change in location of Station WWWD from LaBelle to Estero. However, should the Commission grant InterMart's proposal, Spectrum states that it expects to be fully compensated for all legitimate costs associated with the channel change.

4. In response to the counterproposal filed by InterMart, an Order to Show Cause, 12 FCC Rcd 17407 (1997), was issued to Spectrum Radio, Inc., licensee of Station WEOU, Key West, Florida, affording an opportunity to show why its license should not be modified to specify operation on Channel 224C1 in lieu of Channel 223C1. In reply comments filed on July 23, 1997, Spectrum initially opposed the changes proposed by InterMart. In response to the Order to Show Cause, Spectrum states that it has reached an agreement with InterMart for the expenses associated with the change in frequency at Station WEOU and now supports the modification of the authorizations for Station WWWD and WEOU.⁷

5. As an initial matter, we find that Everglades City is a community for allotment purposes. Everglades City is located in Collier County, is incorporated with its own post office and zip code (34139) and has a population of 321 people according to the 1990 U.S. Census. Further staff research has determined that the Everglades Area Chamber of Commerce serves Everglades City along with several other communities. There is a listing for a City Hall, Fire Station, Sheriff and High School in Everglades City. Everglades City has numerous restaurants, hotels, grocery store, gift shops, gas stations, campgrounds and convenience stores. Based on the above, we believe that Everglades City meets the Commission's basic criteria for allotment purposes. See Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88,101 (1982); see also Kenansville, Florida, 2 FCC Rcd 7194 (1987) and MO&O, 10 FCC Rcd 9831 (1995). However, we need not reach the issue of whether Everglades City is a quiet village because as explained infra at paragraph 7, a first local service at Estero wins on a comparative basis over a first local service at Everglades City.

⁷ An assignment of license from Spectrum Radio, Inc. to Clear Channel Metroplex Licenses, Inc. was granted on July 15, 1998 (BALH-980414GH). On December 31, 1998, an assignment of license was consummated between Clear Channel Metroplex Licenses, Inc. and Clear Channel Radio Licenses, Inc.

6. With respect to InterMart's argument that Reising's Petition for Rule Making must be rejected for violation of Section 1.52 of Commission's Rules, we also disagree. The Petition for Rule Making filed on March 4, 1997, is signed by Reising and provides his address. Reising also provided a statement certifying that the information contained in the petition is true and correct to the best of his knowledge in compliance with Section 1.52 of the Rules. Therefore, we believe that Reising, who is not represented by counsel, has complied with the Commission's verification requirements.

7. A staff engineering analysis indicates that Channel 224A can be allotted to Everglades City, Florida, or Channel 223C3 can be reallocated from LaBelle, Florida, to Estero, Florida, and the license for Station WWWD modified accordingly. To accommodate the allotment at Estero, it is necessary to substitute Channel 224C1 for Channel 223C1 at Key West, Florida, and modify the license for Station WEOV to specify operation on the new channel. However, Channel 224A cannot be allotted to Everglades City and Channel 223C3 at Estero, in compliance with the Commission's spacing requirements. Thus, we must choose between the conflicting proposals and base our decision on the following allotment criteria as set forth in Revision of the FM Policies and Procedures ("FM Priorities"), 90 FCC 2d 88 (1982):

- (1) First full-time aural service; (2) Second full-time aural service;
 - (3) First local service; and (4) Other public interest matters.
- [Co-equal weight given to priorities (2) and (3)].

The allotment of Channel 224A at Everglades City, Florida, will be considered under priority (3), first local service. Our engineering analysis indicates that there will be no first or second full-time aural service provided with this allotment, and there are no AM or FM channels allotted to Everglades City. With respect to LaBelle and Estero, a reallocation and change of community of license proposal, the Commission ``compares the existing allotment versus the proposed allotment to determine whether the reallocation will result in a preferential arrangement of allotments. This determination is based upon the FM allotment priorities set forth in FM Priorities. Using these priorities, we believe that the public interest is best served by reallocating Channel 223C3 to Estero. Specifically, since the retention of Channel 223C3 at LaBelle will not provide a first or second full-time aural reception service and will not be a first local transmission service, it must be considered under Priority (4), other public interest matters. Under this priority, it would provide a second local FM service to LaBelle, a community of 2,703 people. By way of contrast, reallocating Channel 223C3 to Estero, a community of 3,177 people, would be a first local service under Priority (3), which is a higher allotment priority. In addition, the reallocation would result in a gain of service to 126,267 people. While we recognize that there would be a loss of service to 17,759 listeners of Channel 223C3 at LaBelle from the reallocation and that loss of service is a factor that we independently weigh in change of community cases, this loss of service does not warrant denying this proposal because, as demonstrated by InterMart, the people in the loss area receive at least five full-time aural services and are, therefore, considered well served.

8. A review of the proposals indicates that Everglades City and Estero are both deserving of an

FM channel. In an effort to provide each community with its first local service, the staff performed a search to determine if an alternate channel was available for Everglades City. The study indicates that no other channels are available for allotment to the community. Since it appears that an alternate channel is not available, our decision will be determined by the FM Priorities. The allotment of Channel 224A at Everglades City or Channel 223C3 at Estero would provide a first local service to each community, fulfilling priority (3). Therefore, our decision must be based on priority (4) - Other public interest factors. In this regard, we find that the community of Everglades City (population 321 people) is smaller than Estero (population 3,177 people). Our analysis further shows that Everglades City and Estero receive service from five or more FM stations. As both communities receive ample reception service and are considered to be well served, we believe the public interest would best be served by allotting Channel 223C3 to the larger community of Estero. See Three Oaks and Bridgeman, MI, 5 FCC Rcd 1004 (1990) and St. Marks and Woodville, FL, 12 FCC Rcd 11957 (1997). Our decision is further buttressed by the fact that grant of this change of community proposal also makes possible the grant of an application at Bayshore which would provide another first local service.

9. An engineering analysis has determined that Channel 223C3 can be allotted to Estero, Florida, in compliance with the Commission's minimum distance separation requirements at InterMart's specified site.⁸ In accordance with Section 1.420(i) of the Commission's Rules, we also modify Station WWWD's authorization to specify operation on Channel 223C3 at Estero, Florida, as its new community of license. To accommodate the allotment at Estero we shall substitute Channel 224C1 for Channel 223C1 at Key West, Florida, and modify the license for Station WEOU to specify operation on Channel 224C1 in accordance with Section 1.420(g) of the Commission's Rules.⁹ InterMart has stated its intention to reimburse Station WEOU, Key West, Florida, for the reasonable expenses incurred in changing channels.

10. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective July 17, 2000, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

Community	Channel No.
Estero, Florida	223C3

⁸ The coordinates for Channel 223C3 at Estero are 26-21-50 and 81-46-00.

⁹ The coordinates for Channel 224C1 at Key West are 24-40-35 and 81-30-41.

Key West, Florida

224C1, 228C2, 258C1,
296A, 300C1

11. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license for Station WWWD, Channel 223A, LaBelle, Florida, IS MODIFIED to specify operation on Channel 223C3 at Estero, Florida, subject to the following conditions:

(a) Within 90 days of the effective date of this Order, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

12. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license for Station WEOW, Channel 223C1, Key West, Florida, IS MODIFIED to specify operation on Channel 224C1 in lieu of Channel 223C1, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WEOW's license, except the channel, as specified above. Any other changes, except those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for a construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with the channel as specified above, and a license application (FCC Form 302) is filed within ten days of commencement of program tests.

13. Pursuant to Commission Rule Section 1.1104(1)(k) and (3)(m), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the

change in community of license and/or upgrade. As a result of this proceeding, InterMart Broadcasting West Coast, Inc., licensee of Station WWWD, is required to submit a rule making fee in addition to the fee required for the application to effect the upgrade and change in community of license from LaBelle, Florida, to Estero, Florida.

14. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this Report and Order by Certified Mail, Return Receipt Requested, to the following:

Station WEWO
Clear Channel Radio Licenses, Inc.
200 Concord Plaza, suite 600
San Antonio, Texas 78216

15. IT IS FURTHER ORDERED, That the Petition for Rule Making filed by Keith L. Reising (RM-9050) IS DISMISSED.

16. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

17. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180. Questions relating to the application filing process should be addressed to the Audio Services Division, Mass Media Bureau, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
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Mass Media Bureau